



FILED

Aug 20 2008, 9:19 am

Beverly Smith

CLERK

of the supreme court,
court of appeals and
tax court

ATTORNEY FOR APPELLEE:

KEVIN W. KEARNEY
Hunt Suedhoff Kalamaros LLP
South Bend, Indiana

BARBARA PETTINEO,)
)
Appellant-Plaintiff,)
)
vs.) No. 93A02-0803-EX-299
)
CROWN POINT COMMUNITY)
SCHOOL CORPORATION,)
)
Appellee-Defendant.)

August 20, 2008

KIRSCH, Judge

Barbara Pettineo appeals the Indiana Worker's Compensation Board's (the "Board") ruling and award, raising the following restated issues on appeal:

- I. Whether medical evidence established that Pettineo would require on-going medical care to reduce and/or limit the amount and extent of her impairment
- II. Whether the Board erred in ruling that Pettineo's employer is not responsible for paying medical expenses incurred after December 9, 1999.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

In September 1995, Pettineo, in the course of her employment at Crown Point Community School Corporation (the "School"), dropped a urinal weighing sixty to seventy pounds on the big toe of her right foot and fractured the first distal phalanx of the toe. She received medical treatment at the School's expense. The School referred her to Dr. Thomas Kay who made the initial diagnosis. Dr. Kay continued to see her while she complained of increased pain. In January 1997, Dr. Kay, believing that Pettineo had developed complex regional pain¹ or another neurological problem, referred her to a neurologist.

Neurologist Dr. Michael Owens examined Pettineo in October 1997. She reported a daily burning pain, which at times made her unable to walk. Dr. Owens believed a post-traumatic problem or a neuroma, and not complex regional pain, caused Pettineo's pain. Dr. Owens first attempted to manage the pain with various medications. Because pain medication was ineffective, Dr. Owens tried a steroid injection in June 1998. Pettineo had a favorable response to the injection. However, a second injection was not as effective, and

Dr. Owens referred her to Dr. Brian Coleman, an orthopedic foot surgeon.

In May 1999, Dr. Coleman thought that Pettineo could still have complex regional pain and administered an MRI. Based upon his findings, Dr. Coleman performed surgery. In light of Pettineo's condition after surgery, Dr. Coleman assigned a permanent partial impairment rating of 2% of the whole person on December 9, 1999. This ended Pettineo's authorized treatment.

In February 2000, Pettineo returned to Dr. Coleman, complaining of increased pain and swelling of her toe and her right knee. Dr. Coleman believed the knee pain was compensatory and was causally related to the original injury. In April 2001, Dr. Coleman performed a second surgery. Dr. Coleman believed Pettineo was suffering from chronic regional pain and exostosis² of the right big toe, both of which were directly related to her original toe injury. He also believed both surgeries were necessary. Although the second surgery was unauthorized by the School, the Board agreed with Dr. Coleman that corrective surgery was necessary and ordered the school to pay temporary disability benefits following the second surgery.

Dr. Coleman referred Pettineo to Dr. Joseph Fillmore for pain management. Dr. Fillmore diagnosed her with sympathetic mediated pain and complex regional pain of the right foot, which were the result of the trauma or her reaction to surgery. Dr. Fillmore treated

¹ Complex regional pain was referred to as RSD or reflex sympathetic dystrophy in the past, but according to the deposition of Dr. Joseph Fillmore the term RSD is no longer used and has been replaced by the term complex regional pain. *See Appellant's App.* at 118.

² Exostosis is defined as a spur or bony outgrowth from a bone. <http://medical.merriam-webster.com/medical/exostosis>.

her with multiple lumbar sympathetic blocks.³ Unlike steroid injections, there is no limit to the number of injections that can be given because there are no cumulative negative effects. Pettineo responded well to the sympathetic blocks. Dr. Fillmore hopes that, because she has responded so well to the sympathetic blocks, that the continued injections will enable her to remain functional. *Appellant's App.* at 144.

Pettineo filed an Application for Adjustment of Claim against the School. The matter was heard by a Single Hearing Member, who issued an award that found that Pettineo was not entitled to future medical benefits or payment of any medical expenses rendered after December 9, 1999. In addition the Single Hearing Member made the following findings:

13. The medical experts are at variance relating to the issue of need or appropriateness for additional treatment.

14. There is no opinion to suggest that any additional treatment or any specific treatment would limit or reduce the amount and extent of the Plaintiff's impairment.

15. There is no opinion that any ongoing pain does or will increase the amount of and the extent of the impairment of Plaintiff.

Appellant's App. at 12-13. Pettineo applied for a review by the Full Board. The Full Board affirmed the Single Hearing Member's award, and Pettineo now appeals.

³ Multiple lumbar sympathetic blocks are defined as a series of local anesthetic injections designed to block the sympathetic nerves. Sympathetic blocks can be used to treat complex regional pain. <http://www.medcentral.org/body.cfm?id=349>.

DISCUSSION AND DECISION

I. On-Going Medical Treatment

Pettineo argues that the undisputable medical evidence does not support the Board's findings. The Worker's Compensation Act enables the Board to award treatment, services, and supplies as necessary to limit or reduce the amount and extent of an employee's impairment. IC 22-3-3-4(c). This court will not disturb the Board's findings of fact unless we find that the evidence is undisputed and leads to a contrary result. *Cavazos v. Midwest Gen. Metals Corp.*, 783 N.E.2d 1233, 1239 (Ind. Ct. App. 2003). We only consider evidence that tends to support the Board's determination, together with any uncontradicted adverse evidence. *Id.* However, we are not bound by the Board's interpretations of questions of law and reverse if the Board incorrectly interprets the Worker's Compensation Act. *Luz v. Hart Schaffner & Marx*, 771 N.E.2d 1230, 1232 (Ind. Ct. App. 2002), *trans. denied*.

Pettineo asserts that the Board's factual findings, with respect to the need for future medical care, are contrary to and unsupported by the evidence. We agree.

The Board, in finding 14, stated, "there is no opinion to suggest that any additional treatment or any specific treatment would limit or reduce the amount and the extent of the Plaintiff's impairment." *Id.* at 12. Impairment means an injured employee's loss of physical function. *Talas v. Correct Piping Co.*, 435 N.E.2d 22, 26 (Ind. 1982). Here, the uncontradicted medical evidence shows that the periodic lumbar sympathetic blocks enable Pettineo to perform her daily activities, thus reducing her impairment. *Appellant's App.* at 144-53. For example, in July 2004, Pettineo's pain level, on a scale of one to ten, was an eight. *Id.* at 152-53. After a series of injections she returned on August 30th with a pain

level of two. *Id.* No contrary evidence indicates that the sympathetic blocks failed to reduce Pettineo's impairment. Therefore, because the medical evidence and opinions contained in the record clearly establish that the sympathetic blocks reduce her impairment; we reverse the Board's findings pertaining to the benefits of on-going medical care.

II. Medical Expenses Incurred Since December 9, 1999

Pettineo maintains that the Board erred by not holding the School financially responsible for medical expenses incurred after her injury had reached "maximum medical improvement," which was diagnosed on December 9, 1999. She seeks to hold the school financially responsible for the second surgery and subsequent palliative care, including the sympathetic lumbar blocks. IC 22-3-3-4(d) states:

If, because of an emergency, or because of the employer's failure to provide an attending physician . . . or because of *any other good reason*, a physician other than that provided by the employer treats the injured employee during the period of the employee's temporary total disability, or necessary and proper surgical, hospital, or nursing services and supplies are procured within the period, the reasonable cost of those services and supplies shall, subject to the approval of the worker's compensation board, be paid by the employer." (emphasis added).

To support her position, Pettineo directs us to *Daugherty v. Industrial Contracting & Erecting*, 802 N.E.2d 912 (Ind. 2004). In *Daugherty*, an employee with an injured knee reached maximum medical improvement and was released from authorized medical care. *Id.* at 914. The employee continued to suffer pain and sought treatment with another, unauthorized, doctor. That doctor recommended a total knee replacement. The employee requested authorization, which was denied, from the employer's insurance carrier, and had the surgery anyway. Our Supreme Court held that this unauthorized surgery fell within the

“other good reason” provision of IC 22-3-3-4(d). *Id.* at 918-19. *Daugherty* also outlined the following test to determine whether unauthorized medical treatment falls within the “other good reason” prong:

[I]f the employee, without authorization but in good faith, obtains medical treatment different from that provided by the employer, and it is determined that the treatment provided by the employer was inadequate treatment for the employee's condition and the unauthorized treatment received by the claimant was medically reasonable and necessary treatment, the employer should be responsible, notwithstanding the lack of prior approval by the employer.

Id. Although reimbursement for unauthorized treatment should be the rare exception, terms contained in the Worker’s Compensation Act are to be construed liberally to effectuate the humane purposes of the Act. *Id.* at 919.

In *Daugherty*, the employee sought medical treatment from an independent physician who was never authorized to provide treatment. The employee was deemed to have acted in good faith because he first sought approval from the employer’s insurance carrier before obtaining treatment. The *Daugherty* court held that the current treatment had failed because he still experienced pain and was unable to return to work. *Id.* Finally, the knee replacement was deemed reasonable and necessary. *Id.*

In the present case, we find that Pettineo sought treatment in good faith, by returning to the same doctor who was previously authorized to provide treatment. Additionally, the Board’s findings indicate that the second surgery was deemed appropriate and necessary because the Board provided temporary disability compensation following the surgery. *Appellant’s App.* at 12. Pettineo’s previous treatments had failed because she was still subject to impairment that limited her functionality at work. Finally, the sympathetic blocks

also appear to be reasonable and necessary, given Dr. Fillmore's opinions as to their effectiveness in allowing Pettineo to function.

We also find analogous *Krause v. Indiana University-Purdue University at Indianapolis*, 866 N.E.2d 846, (Ind. Ct. App. 2007). In *Krause*, the plaintiff received treatment from a university doctor after a work related injury. After having personality conflicts with her original doctor, she attempted to receive treatment from another university-employed doctor. When the university complained that this was unauthorized treatment, this court found that the university's concerns were unwarranted because the doctor was considered part of the employer's corporate entity. *Id.* at 853.

Here, Pettineo sought further treatment from Dr. Coleman, who, prior to December 9, 1999, was an authorized physician. Although Dr. Coleman is not an employee of the School, *Krause* is analogous to the present case in that Pettineo was returning to the physician whom the employer previously trusted to provide medical treatment. Likewise, Pettineo should receive reimbursement for the treatments provided by Dr. Fillmore, since Dr. Coleman referred her to Dr. Fillmore for pain management.

We reverse and remand with instructions to amend the findings to reflect the medical evidence expressed above and to institute an award that reimburses Pettineo for medical treatment obtained after December 9, 1999.

Reversed and Remanded.

VAIDIK, J., and CRONE, J., concur.